No. 2422.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

H. K. LOVE, United States Marshal,

Plaintiff in Error,

vs.

VASO PAVLOVICH,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

H. A. DAY and
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Fairbanks, Alaska,
Attorneys for Defendant in Error.

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BRIEF OF DEFENDANT IN ERROR.

Statement.

This action was commenced in the District Court, Territory of Alaska, Fourth Division, by Defendant in Error against Plaintiff in Error herein for the wrongful conversion upon the part of defendant below, as United States States Marshal, of two hundred (200) cords, more or less, of wood belonging to plaintiff.

This wood, May 17th, 1912, was the property of Sam Vlik & Company, a copartnership composed of Sam Vlik, Dan Vlik and Mike Onak, who were then engaged in placer mining. This particular wood had, theretofore, been purchased by Sam Vlik & Company from plaintiff,

Vaso Pavlovich, besides other wood, which had been used by said purchasers in their mining operations. By reason of said sale of said wood, and the furnishing by Pavlovich to Sam Vlik & Company certain horse feed and freight money thereon, the said Sam Vlik & Company was on the 17th and 18th of May, 1912, and for a long time prior thereto, had been indebted to plaintiff in the sum of Seventeen Hundred Twenty Dollars ($1720.00) (Tr. pp. 19-20).

On the evening of May 17th, Sam Vlik went to plaintiff and told him that he could not pay him any money, but that if he would accompany him to town, he would give him a bill of sale to this wood in controversy (Tr. pp. 21, 22, 29). Whereupon they came to town and on May 18th, 1912, Sam Vlik & Company, by Sam Vlik, made, executed, acknowledged and delivered to plaintiff a bill of sale to said wood, which bill of sale is absolute in form and recites a consideration of Two Thousand Dollars ($2,000.00) (Plaintiff's Exhibit "A", Tr. pp. 22-23). Sam Vlik had authority to execute for the firm this instrument. Mike Onak, one of said firm, testified that the same was given to pay for the wood and horse feed owed to plaintiff (Tr. pp. 37-38), and further testified that Sam Vlik had told witness, the night before, that he was going to town to give Pavlovich a bill of sale to this wood (Tr. p. 38). Dan Vlik, the third member of said firm, testified that Sam Vlik was the manager of the partnership and run the business and had the authority to give this bill of sale (Tr. p. 45), and on said page states the object of said bill of sale, the same

being to cancel said debt.

Plaintiff caused notices to be made by Judge Dillon, who made out the bill of sale, which notices claimed this wood to be the property of plaintiff, and that he, the plaintiff, in the evening of May 18th, 1912, posted four (4) of said notices on the wood in controversy in conspicuous places, to-wit: one notice on each of the four (4) corners thereof (Tr. pp. 24, 25, 42, 43).

By reason only of the testimony of plaintiff on cross-examination, appearing on page 34, Tr., the plaintiff in error herein contends that this bill of sale was in fact a mortgage, and inasmuch as actual, immediate, and notorious possession was not taken, that the mortgage would be void as against plaintiff in error, because the instrument in writing did not contain a clause providing for the mortgagor to retain possession, and that the same was not filed or indexed as a chattel mortgage.

The testimony of plaintiff on cross-examination referred to, we contend, is not sufficient to change the character of this instrument from a bill of sale to a mortgage, but whether the same is a bill of sale or a mortgage, the fact of putting up these notices and subsequently measuring the wood, constituted the taking of possession as much as the nature of the property and the conditions would permit (Tr. pp. 25, 34, 35, 42, 43).

May 17th, 1912, two actions for debt against Sam Vlik & Company were commenced in the Justice of the Peace or Commissioner's Court at Chatanika, one by Paul Ringseth and the other by Jack McLean. Summonses were issued and made returnable May 24th at the hour

of two P. M. and three P. M., respectively. Writs of attachment were issued, and on said 17th day of May said summonses and writs were served upon Sam Vlik & Company, and according to the Marshal's return and the testimony of the Deputy Marshal, the wood in controversy was, on the night of May 17th or the morning of the 18th of May, 1912, attached by taking the same into custody by said Deputy Marshal, who thereupon claims to have placed the custody of said property with said plaintiff Ringseth, but states that said appointment was not in writing, and that he, the said Deputy, was not sure whether he appointed said Ringseth custodian or whether the Justice of the Peace or Commissioner made the appointment (Tr. pp. 68, 97). Ringseth, plaintiff in one of said Justice of the Peace cases, who claimed to act as custodian as aforesaid, testified that he looked after said property (in a general way) and left the matter, at least a portion of the time, with plaintiff in the second Justice Court suit, Jack McLean (Tr. pp. 94, 97, 98, 99, 100). Said Deputy Marshal claims to have posted notices of attachment upon said wood (Tr. pp. 59 to 63). Plaintiff admits in his pleadings and contended at the trial that defendant attached only three (3) or three and one-half (3½) cords of wood which was in a small and separate pile from the wood in controversy (Tr. pp. 16, 67, 68, 69). The evidence upon this subject as contended for by defendant consists in the testimony of Lysle Brown, Deputy Marshal (Tr. pp. 59 to 63), and the said Deputy Marshal's return upon the writs (Tr. pp. 59, 60 and 66, Defendant's Exhibits 2 and 5). The

testimony of said Deputy Marshal was in part impeached by the witness H. A. Day (Tr. pp. 103-104), and by the testimony of Peter Vidovich (Tr. pp. 100-103).

May 24th, 1912, judgments were entered in said two cases by default, and the records show that the judgment in the Ringesth case was entered at two o'clock P. M. of said date, the same being the return hour and day of the summons (Tr. pp. 70, 71, 74), and that the judgment in the McLean case was entered at three o'clock P. M. (Tr. p. 75) of said date, the same being the return day and hour as directed in said summons. The Justice of the Peace, therefore, did not wait an hour in either case before entering judgment as is required by the statute of Alaska (Compiled Laws of Alaska, Section 1844).

The Justice of the Peace, also, in entering said judgments, failed to foreclose the attachment liens and failed to incorporate an order providing for the sale of the attached property as required by the statute (Compiled Laws of Alaska, Section 979).

Defendant in error contends that each of said judgments is void, and that the executions issued thereon, as well as the sales of said property thereunder, are void. Defendant in error further contends that even if such judgments were not void, that the failure to foreclose any attachment lien acquired in said suits destroyed any and all liens, and therefore destroyed any rightful possession which the defendant below may have acquired upon said wood by reason of said attachments, and that during the interval between the rendition of said judgments and the subsequent seizure of the property

under execution, plaintiff's title and possession to said wood became perfected (if the same was not complete), by reason of the public notices on each of the four (4) corners of said wood posted by plaintiff May 18th as aforesaid, claiming the ownership of said property.

Judgment was entered in the Ringseth case at two o'clock P. M., May 24th, as aforesaid, and on said day a plain execution was issued (Tr. pp. 77-78), but that such execution was not placed in the hands of the Marshal until May 25th (Tr. p. 78), on which date an alleged seizure of one hundred twenty-three (123) cords of wood was made under said execution by said Marshal, and a sale under said seizure, June 6th, 1912, for One Thousand Seventy-Six Dollars ($1,076.00) to the said Ringseth, plaintiff in one of said Justice cases, and alleged custodian of said property under said Marshal, the plaintiff in error herein. An interval, therefore, exists between the entry of judgment and the seizure under execution.

Contrary to the common law, no lien attaches in Alaska against the personal property of a defendant under execution until actual seizure. Section 1106, Subdivision 5, Compiled Laws of Alaska, provides:

> "Until a levy, property shall not be affected by the execution. When property has been sold or debts received by the Marshal on execution, he shall pay the proceeds thereof, or sufficient to satisfy the judgment, to the Clerk by the day on which the writ is returnable."

Execution was not issued in the McLean case

until June 12th (Tr. pp. 79-80), under which a levy and sale was made of forty (40) cords, being the balance of said wood, for Two Hundred Seventy-Five Dollars ($275.00), June 25th, 1912 (Tr. pp. 88-89), at which sale the said Ringseth, who at all times had full notice of plaintiff's claims in the premises, became the purchaser. Plaintiff, together with an interpreter, was present at said sale of June 6th (Ringseth, the purchaser, being present), and again notified plaintiff in error of his claim of ownership to said property (Tr. pp. 27, 28, 43, 44, 90 and 99).

The trial of said cause began April 25th, 1913, before the Court and Jury and continued with the ordinary trial proceedings, which on the 29th of April resulted in a verdict by the Jury in favor of plaintiff and against the defendant for the sum of Thirteen Hundred Twenty-five Dollars ($1,325.00) (Tr. p. 128). That after defendant's motion for a new trial was overruled by the Court, judgment was, on May 24th, 1913, entered against defendant in favor of plaintiff in said sum of Thirteen Hundred Twenty-Five Dollars ($1,325.00) and costs of suit.

Plaintiff in error has in his brief herein set forth the positions relied upon (Brief of Plaintiff in Error, pp. 7-8). The contentions of defendant in error being partially set forth in said Brief of Plaintiff in Error on page 6 and the first three lines of page 7 of said Brief. We desire to add that defendant in error further contends that, even if said bill of sale from Sam Vlik & Company to defendant in error should be treated as a

mortgage, that the same would be a legal mortgage, property in possession of the mortgagee, thereby eliminating the necessity of chattel mortgage formalities contended for by plaintiff in error, for the reason, not only that the possession of defendant in error was sufficient as against plaintiff in error in any event, but that his possession was as complete as the nature of the property and the conditions would permit. That a mortgagee's interest in the property with possession or with a right of possession is sufficient to sustain an action for conversion.

Defendant in error further contends that, by reason of the invalidity of the Justice of the Peace judgments, and by reason of the loss of any attachment liens which may have been acquired, and by reason of the knowledge of the defendant in error and his deputies and alleged custodians (plaintiffs in said Justice cases), as well as by reason of the knowledge of the purchaser at said sales, who is the real party in interest; that the plaintiff in error herein is not, and never was, in a position to complain of any lack of possession of said wood upon the part of defendant in error; and is not in a position to complain of any presumption of fraud or secret trust or intended mortgage, because his entire defense to said action failed upon the trial of said cause.

Argument.

I.

Paintiff in error, in his brief, on page 24, paragraph I, contends that the bill of sale of the property in ques-

tion from Sam Vlik & Co. to plaintiff is void, and declares in subdivision "a," in substance, that said bill of sale was executed by Sam Vlik without authority and without the knowledge or consent of the other partners.

This statement is unwarranted by the evidence. This bill of sale was executed by Sam Vlik & Co. (Plaintiff's Exhibit "A," Tr. pp. 22-23). The partnership consisted of three members only, "There was Sam Vlik and myself (Dan Vlik) and Mike Onak, three of us in this firm" (Tr. p. 44). As shown by the bill of sale the firm's name was signed by Sam Vlik, "Sam Vlik was the manager of the partnership and run the business and had the authority to give this bill of sale" (Testimony of Dan Vlik, Tr. pp. 44-45). Mike Onak, partner, swore: "That the bill of sale was given to pay for wood and horse feed in payment of the debt that Sam Vlik & Co. owed to the plaintiff" (Tr. p. 37). * * * "Sam Vlik told me (Mike Onak) on the night before, on the 17th, he was going to town to give Pavlovich a bill of sale of the wood" (Tr. p. 38). We submit that this evidence clearly shows authority to execute and deliver the bill of sale in question. Furthermore we submit that no one except the partnership or a member of Sam Vlik & Co. could object to any want of authority under the circumstances.

In subdivision "b" of said paragraph I, page 25 of said Brief of Plaintiff in Error, it is contended that a secret trust was in said bill of sale created or reserved in favor of the transferer.

The only evidence which might be argued in favor of plaintiff in error on this point is the testimony of

plaintiff below on his cross-examination as to the reason why the bill of sale recited the consideration of Two Thousand Dollars ($2,000.00), when in fact the indebtedness sought to be liquidated was but Seventeen Hundred Twenty Dollars ($1,720.00). It appears that the exact amount of the indebtedness was not known or calculated at the time of making the bill of sale, and it further appears from said testimony that the object of making the bill of sale was to pay the debt. Plaintiff below does admit that if the wood (the exact amount and value of which was then unknown) would sell for more than the debt in question, that Pavlovich did not consider that the excess above the debt would belong to him (Tr. pp. 30-34). We contend that these facts do not change the character of the bill of sale to a mortgage; neither does it create a secret trust, and cannot be regarded as a fraudulent instrument. Is is undisputed that the debt due plaintiff was Seventeen Hundred Twenty Dollars ($1,720.00); that the number of cords of wood covered by said bill of sale and sold by the Marshal was one hundred sixty-three cords instead of two hundred fifteen (215), as recited in said bill of sale; also that the value of said wood was not in excess of the debt, for the market price was less than said debt, to-wit: Thirteen Hundred Fifty-One Dollars and Twenty-Five Cents ($1,351.25), the aggregate purchase price realized at the Marshal's sales (Tr. p. 89, Defendant's Exhibit 13, Defendant's Exhibit 12, Tr. p. 87). The fact that Pavlovich intended not to take any more money from Vlik & Co. than the amount of his debt in the event the

wood should sell for a greater sum, amounted to a conditional sale, conditioned only upon a contingency which never arose, and could not arise. Therefore it should be treated as an absolute sale.

Plaintiff in Error's contention in subdivision "c" of paragraph I, that plaintiff knew that he was securing a preference and that Vlik & Co. were insolvent, is not based upon the evidence in this record. The only evidence that would tend to show Vlik & Co. insolvent is the testimony of plaintiff to the effect that Sam Vlik came to him on the night before the bill of sale was given and stated he could not pay him any money, but would give him this bill of sale to the wood in question (Tr. pp. 31, 32, 33). This neither proves the insolvency of Vlik & Co. or that plaintiff knew he was securing a preference. However, it is immaterial, even if plaintiff was knowingly securing or attempting to secure a preference. The only way of defeating such attempt would be by bankruptcy proceedings. Plaintiffs in the two Justice cases were attempting, through the United States Marshal, the defendant herein, by their attachments, to secure a preference (if Vlik & Co. was insolvent), and therefor cannot complain herein.

The declarations made under Subdivision "d" of said Paragraph I, page 25, by plaintiff in error, are unwarranted, as there is no testimony that this wood was "practically the only asset of Sam Vlik & Co."

What became of the mine or lease thereon or the mining machinery, or the cleanup of gold about that time, inquired about by counsel for defendant below, does not

appear (Tr. p. 33).

II.

Under paragraph II in the brief of plaintiff in error, pages 26-27-28, it is contended that the Marshal made a valid levy under the writ of attachment. The levy was accompanied by the Marshal's possession, and which possession prevented plaintiff below from acquiring any rights under his bill of sale.

To support this contention, subdivision 3 of Section 972 of the Compiled Laws of Alaska is quoted, which requires that a copy of the writ "and a notice specifying the property attached *be left* with the person in possession" (Italics ours.) This was not done, or claimed to have been done. The officer levying the attachment, Mr. Brown, testified that he served a copy of the writ of attachment and the summons (on Dan Vlik) on the mining claim of Sam Vlik & Co. Then he states: "I posted a notice on the wood pile on a post that was standing close to the wood" (Tr. pp. 58-59 and Defendant's Exhibit 2). This same method was followed by said Deputy Marshal in the other Justice case of McLean vs. Sam Vlik & Co. (Tr. pp. 64-65).

In said brief, on said page 26, plaintiff In error admits that it is undisputed that the Marshal served the notice of attachment upon and delivered copies thereof to Dan Vlik, a member of said firm, who was on the ground and in possession of the wood. We therefore contend that the statute quoted by plaintiff in error was not complied with, and therefore, no attachment lien was

created. However, if defendant below did accquire a lien by virtue of said alleged attachments, by taking the same into custody and leaving the same in the custody of defendant's agent, to-wit, Ringseth, and Ringseth delegated such custody to McLean, all upon the theory that the wood was so ponderous that it was impracticable to move the same; we then submit (1) That the uncertainty of such appointments, coupled with the want of action upon the part of said custodians, renders the possession of the Marshal insufficient. The Marshal states that he is uncertain whether he or the Justice Court appointed Ringseth custodian (Tr. pp. 68-69). Ringseth and McLean testified that McLean, in a general way, looked after the possession of this property (Tr. pp. 94, 97). It will not be contended that the Justice had any authority to appoint a custodian for the Marshal, and the testimony of the two custodians discloses that their dominion over the property was in no wise notorious, and was wholly insufficient to give notice to the plaintiff below or any other person. If, however, it be conceded that the property was properly attached and the possession of the custodian sufficient, then on the 18th of May, 1912, when plaintiff secured from Sam Vlik & Co. the bill of sale, he took the property subject to the attachment and gave notice of his claim to the right of possession to all persons concerned by posting four (4) notices in conspicuous places upon the property, and thereafter measured the same (Tr. pp 24, 25, 42, 43). This certainly was the taking of possession as fully as was practicable if the property was subject to a change

of possession. If it was not so subject to a change of possession, it was an open and notorious claim of possession upon the part of plaintiff below.

Even if liens were secured by proper levy, they were lost by failure of the Justice to foreclose them.

Moore, Shafer Shoe Mfg. Co. vs. Billings (Or.), 80 Pac., 422.

III.

In paragraph III, pages 29, 30, 31, 32 of the brief of plaintiff in error, great emphasis is placed upon the necessity of an actual, open and notorious change of possession from Sam Vlik & Co. to plaintiff below in order to render the bill of sale in question effective. Counsel supports such declaration by a large number of authorities from the States of California, Colorado and Montana.

In each of these three States the want of such change of possession is taken to be CONCLUSIVE proof of a fraudulent conveyance and therefore void. This is not the law under the statutes of Alaska. In California Civ. Code, Section 3440, it is provided, "that a sale of personal property shall be CONCLUSIVELY PRESUMED to be fraudulent, as against the seller's creditors, where there is no immediate delivery and actual and continued change of possession."

Guthrie vs. Carney, 124 Pac., 1045.

In Colorado, under Gen. St. Colo., c. 43, Section 14, "providing that every sale of goods, unless accompanied by immediate delivery and followed by actual and con-

tinued change of possession, shall be CONCLUSIVELY PRESUMED fraudulent as against the vendor's creditors."

Sweeney vs. Coe et al., 21 Pac., 705.

1 Mills' Ann. St. (Colo.), Sec. 2027.

In Montana, the code on this subject provides that "every transfer of personal property not accompanied by an immediate delivery and followed by an actual and continued change of possession is CONCLUSIVELY PRESUMED fraudulent and void against creditors, etc."

Revised Codes (Montana), Sec. 6128.

Taylor vs. Malta Mercantile Co., 132 Pac., 549.

But, under the code of Alaska fully set forth on page 21 of said brief of plaintiff in error, it is declared that a lack of such change and continued possession "shall be *presumed prima facie* to be a fraud against the creditors of the vendor."

Sec. 1875, Compiled Laws of Alaska.

We, therefore, contend that, even if there was a want of such change of possession as the statute contemplates, that in Alaska the presumption of fraud is only *prima facie,* and that in the case at bar, this presumption was overcome by the evidence which was submitted to the Jury, and the Jury rightfully upheld the validity of the said bill of sale.

The declaration of plaintiff in error on page 30 of his said brief, to the effect that there is no evidence that the Marshal had notice of the claim of said wood by Pavlovich, is unwarranted.

Ringseth and McLean, the two plaintiffs in said Justice cases, both claiming to be agents of the United States

Marshal as custodians of the property, knew long before the sale or levy under execution, and both testified to the knowledge of the notices posted upon the wood by Pavlovich (Tr. pp. 92-99). The Marshal also knew, as he secured an indemnity bond (Tr. p. 44).

Just before the sale of said wood took place June 6th, Deputy Marshal Carlson was fully notified of the claim of Pavlovich to said wood, whereupon the real party in interest in this case became the purchaser (Tr. pp. 27, 28, 43, 44, 90, 99). Besides all this actual notice to the defendant below, there were the four (4) notices posted in conspicuous places upon the four (4) corners of said wood piles, setting forth the claim to said wood and the right of possession of plaintiff below. We, therefore, contend that, inasmuch as all persons concerned had notice of Pavlovich's right of possession, that his continued claim to the right of possession, as set forth in these notices, certainly attached to the wood immediately upon the loss of the attachment lien.

Moore, Shafer Shoe Mfg. Co. vs. Billings, supra.

Shinn on Attachment, Last Par., p. 393.

IV.

Plaintiff in error's position set forth in paragraph IV, page 32, of his brief, we submit, is untenable. There is no evidence in the case proving or tending to prove that Pavlovich knew that the bill of sale was made for the purpose of hindering and defrauding other creditors. The fact is, that it was not made for such purpose, but for the purpose of settling the debt due from Vlik & Co. to

plaintiff below. It is true that the bill of sale was given for a past consideration. It is also true that the two plaintiffs in the Justice cases were seeking a preference by attaching on over due debts. Plaintiff in error cannot complain in this suit under these circumstances. The bankruptcy law was not invoked. And the statement of plaintiff in error, on pages 32-33 of his brief, that Pavlovich knew that this transfer coveted "practically the only available asset of the firm," is a bare statement of counsel not supported by the evidence in this case. These matters were duly submitted and passed upon by the Jury in favor of plaintiff below.

V.

Counsel's declaration contained in paragraph V, pages 33-34 of said brief of plaintiff in error, to the effect that the Court erred in not permitting defendant below to change the judgment roll of the Justice Court by parol testimony, is not supported by any authority, and we submit, the Court properly disallowed such testimony.

Gaunt vs. Perkins, 9 Or., 355.

Hislop vs. Moldenhauer, 24 Or., 106.

The statute of Alaska relied upon is as follows:

> Section 1844, Compiled Laws of Alaska: "A party is entitled to one hour in which to make his appearance after the time specified in the summons, and not otherwise * * *"

It is conceded in the statement of plaintiff in error, page 6 of his brief, and it likewise appears in evidence, that the record of the Justice Court shows the entry of

judgments, in the two cases, to have been made at the hour required by the summons for the defendant's appearance, without waiting an hour thereafter. It necessarily follows that the Justice's record could not be contradicted.

Hislop vs. Moldenhauer, supra.

State vs. Connelly, 90 Pac., 902.

We contend that the premature entry of these judgments renders each of them void, and that from the time the same appeared in this case, defendant had no further standing in Court.

"Docket must show jurisdiction, otherwise judgment is void."

State ex. rel. Kenyon, 53 Pac. (Mont.), 536.

Gaunt vs. Perkins, 8 Or., 355.

That the alleged liens created in these Justice Court cases by attachment were lost in entering the judgments, by the omission of an order foreclosing such liens, is conclusively settled by the Alaska statute, which is as follows:

> Sec. 979, Compiled Laws of Alaska: "If judgment be recovered by the plaintiff and it shall appear that the property has been attached in the action and has not been sold as perishable property or discharged from the attachment as provided by law, the Court shall order and adjudge the property to be sold to satisfy the plaintiff's demands, and if execution issue thereon, the Marshal shall apply the property attached by him, or the proceeds thereon, upon the execution, and if there be any such property or pro-

ceeds remaining after satisfying such execution, he shall, upon demand, deliver the same to the defendant."

Moore & Shafer Shoe Mfg. Co. vs. Billings, 80 Pac. Rep., 422.

These liens are conceded to be lost in the brief of plaintiff in error (pp. 3, 33, 37).

In this action, defendant below, as a defense, relies upon the regularity of the proceedings in the Justice Court, and in his answer pleads the same (Tr. pp. 4, 5, 6, 7, 8). In plaintiff's reply, plaintiff controverts the same and challenges the validity of such proceedings. Section 909, Compiled Laws of Alaska, throws the burden of proof upon the defendant under these circumstances, and is as follows:

"In pleading a judgment or other determination of a court or officer of special jurisdiction it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading shall be bound to establish on the trial the facts conferring jurisdiction."

Justice of the Peace docket must show facts to confer jurisdiction. Section 1777, Subdivisions 4 and 9, Compiled Laws of Alaska, provides:

"Section 1777. The docket of a Justice of the Peace is a book in which he must enter:

"Subdivision 4: The time when the parties, or either of them, appear, or their failure to do so.

"Subdivision 9: The judgment of the Court and when given."

VI.

The position of plaintiff in error set forth in paragraph VI, pages 34-35 of his said brief, has, we believe, been covered elsewhere in this brief by defendant in error. To have sustained a motion for a nonsuit would have encroached upon the province of the Jury by the Court. We contend that the case was properly submitted to a Jury for determination.

VII.

We submit that the instructions proposed by defendant below and refused or modified by the Court, were properly ruled upon under the law of this case. Many of the proposed instructions of defendant below were, in substance, given by the Court.

VIII.

Plaintiff in error complains of a number of instructions given by the Court, as set forth in paragraph VIII, pages 35-36-37 of his said brief; but, we submit, that upon a consideration of all of the instructions given by the Court, under the facts of this case, it clearly appears that the law, applicable to the case at bar, was properly defined to the Jury.

The complaint of plaintiff in error made on pages 37-38 of his brief, that defendant in error herein is attempting to mulct the United States Marshal in damages and

compelling said Marshal to go to the expense of defending an official act, performed in due course of business, etc., would be passed unnoticed by us were it not that the record herein discloses the fact to be that the defendant Marshal is not the real party in interest, and has not been to any expense in defending his official acts, but has, in advance, obtained security for any damages in the premises, and that the real party in interest is the purchaser of said wood, and who had, at all times, actual notice of plaintiff's claim (Tr. pp. 43-44).

The attempt of plaintiff in error to discredit Pavlovich and abuse Sam Vlik, and draw upon his imagination, and not the record, as set forth on pages 38-39 of said brief, are wholly unwarranted. On page 1 of said brief, counsel, without one syllable of evidence in the record, declares that all the members of Sam Vlik & Co. are Austrians, and on page 38 states that Sam Vlik, after making a cleanup of gold on May 17th, and executing this bill of sale May 18th, "immediately disappeared from the scene and returned to Russia." Counsel for plaintiff in error asks this Court to presume that the creditors did not receive this gold dust, and blames defendant in error for this situation. There is no evidence that Sam Vlik went to Russia, no evidence that he "immediately disappeared from the scene"; and the only evidence in regard to Sam Vlik's whereabouts appears in the testimony of Dan Vlik, who stated in the trial, about one year after this bill of sale was executed, that at said time Sam Vlik was in the "old country" (Tr. p. 44). On page 39, said counsel asks this Court not only to accept

these matters as truths, but to accept them as material and as a reason why the trial Court erred in not granting defendant's motion for a directed verdict in favor of defendant below.

We submit that the instructions of the Court covered the facts, and are according to the law of this case. That the rulings of the Court are according to law, so far as they relate to the case of the plaintiff in error.

We contend, however, that each of the two judgments prematurely entered in the Justice Court are void for all purposes. It, therefore, follows that the execution, seizure and sale under each of said judgments were void, and that plaintiff's contention of said invalidity at the trial was not a collateral attack upon the same, and that the Court below should have ruled that defendant's defense wholly failed at said trial.

We, therefore, submit that the judgment of the lower Court should be, in all respects, affirmed.

Respectfully submitted,

H. A. DAY and

MORTON E. STEVENS,

Attorneys for Defendant in Error.

Dated Fairbanks, Alaska,

October 15th, 1914.